No. 354

IN THE

# Supreme Court of the United States

OCTOBER TERM—A. D. 1923.

THOMAS A. DELANEY,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

## MOTION TO ADMIT PETITIONER TO BAIL AND TO ADVANCE THE CAUSE AND BRIEF IN SUPPORT OF MOTION.

LAURENCE M. FINE,
*Attorney for Petitioner.*

ELIJAH N. ZOLINE,
*of Counsel.*

IN THE

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No.

THOMAS A. DELANEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

## MOTION TO ADMIT PETITIONER TO BAIL AND TO ADVANCE CAUSE.

Now comes Thomas A. Delaney, the petitioner, and moves the Court to admit him to bail pending the final disposition of the above-entitled cause by this Court on the Writ of Certiorari heretofore granted by this Court and to advance the cause for hearing, pursuant to Rule 26, §3, of this Court, for the following reasons, to-wit:

On April 20, 1922, this petitioner was sentenced by the United States District Court for the Eastern District of Wisconsin, to be imprisoned in the United States Penitentiary at Leavenworth, Kan-

sas, for the term of two (2) years, and to pay a fine of Ten Thousand ($10,000) Dollars, on two indictments charging him with conspiracy to violate the National Prohibition Act. This judgment was on a Writ of Error affirmed by the United States Circuit Court of Appeals for the Seventh Circuit, and thereupon your petitioner on June 4, 1923, applied to this Court for a Writ of Certiorari. The Writ of Certiorari was duly granted by this Court on the 11th day of June, 1923. In the meantime, on May 1, 1923, the mandate of the United States Circuit Court of Appeals for the Seventh Circuit was issued and petitioner was on or about the 7th day of May, 1923, taken in custody and incarcerated in the United States Penitentiary at Leavenworth, Kansas, where he is now confined undergoing punishment under said judgment.

In his petition for certiorari, filed in this Court, this petitioner assigned three grounds:

FIRST.—Petitioner was denied his right to be confronted by the witnesses against him as provided in Article 6 of the Amendments of the Constitution of the United States of America.

SECOND.—The hearing on appeal in this cause was before a Court constituted in violation of Section 120 of the Federal Code, in the Statutes of the United States, which provides:

> "That no Judge before whom a cause or question may have been tried or heard, in a District Court, or existing Circuit Court, shall sit on trial or hearing of such cause or question in the Circuit Court of Appeals."

THIRD.—That there was such a complete failure of proof as to amount to a loss of jurisdiction of the Trial Court.

Petitioner will rely upon each of the grounds specified in the said petition for certiorari and respectfully submits that as a matter of law he ought not to undergo the punishment imposed upon him by said judgment while his case is pending in this Court upon the writ of certiorari duly allowed by this Court.

For the foregoing reasons, as more particularly indicated in the brief accompanying this motion, your petitioner respectfully moves this Court that he may be admitted to bail pending the final disposition of his case by this Court and that the cause be advanced for hearing in this Court in accordance with Rule 26, §3, of this Court.

LAURENCE M. FINE,
Attorney for Petitioner.

ELIJAH N. ZOLINE,
of Counsel.

State of Illinois, }
County of Cook, } ss.:

Laurence M. Fine, being duly sworn, deposes and says that he is the attorney of record for the petitioner in the above entitled cause, that the foregoing motion by him subscribed was duly read by him and that the same is true to the best of his knowledge, information and belief.

LAURENCE M. FINE.

Subscribed and sworn to before me this
day of November, 1923.

Notary Public.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM—A. D. 1923.

No.

THOMAS A. DELANEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

## BRIEF IN SUPPORT OF MOTION.

### I.

**A defendant in a criminal case is entitled to bail, as a matter of right, pending the disposition of his case in the appellate tribunal, especially if the offense for which he is held is bailable.**

In *Hudson* vs. *Parker*, 156 U. S., 277, at page 285, this Court said:

> "The statutes of the United States have been framed upon the theory *that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort,* be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail,

not only after arrest and before trial, but after conviction and pending a writ of error.

"The statutes as to bail upon arrest and before trial provide that 'bail may be admitted' upon all arrests in capital cases, and '*shall be admitted*' *upon all arrests in other criminal cases;* and may be taken in capital cases by this Court, or by a justice thereof, or by a Circuit Court, a Circuit Judge or a District Judge, and in other criminal cases by any Justice or Judge of the United States or other Magistrate named. Rev. Stat. §§1014-1016" (Italics ours).

This rule should be held applicable to a writ of *certiorari.* In *Harris* vs. *Barber,* 129 U. S., 369, this Court said:

"A writ of *certiorari,* when its object is not to remove a case before trial, or to supply defects in a record, but to bring up after judgment the proceedings of an inferior court or tribunal whose procedure is not according to the course of the common law, *is in the nature of a writ of error*" (Italics ours).

## II.

**In general—The effect of the allowance of the writ of certiorari.**

Counsel for the petitioner was unable to find any decision by this Court dealing directly with the effect of the allowance by this Court of a writ of certiorari upon the judgment to be reviewed, but the following authorities stating the common-law rule, are in point:

In *Ewing* vs. *Thompson*, 43 Pa. St., 377, Judge Strong (afterwards Mr. Justice Strong), speaking for the Pennsylvania Supreme Court, said:

> "Very many of the English as well as American authorities are collected in *Patchin* vs. *Maylor, etc.*, 13 Wend., 664. There are very many others, all holding a common-law writ of certiorari, whether issued before or after judgment, to be, in effect, a *supersedeas*. There are none to the contrary. In some of them it is ruled that action by the inferior court after the service of the writ is erroneous; in others it is said to be void, and punishable as a contempt. They all, however, assert no more than that the power of the tribunal to which the writ is directed is suspended by it; that the judicial proceedings can progress no further in the lower court" (Italics ours).

A similar expression is found in *McWilliams* vs. *King*, 32 N. J. Law, 23, where the Court in the course of its opinion, said:

> "But it is to be remembered that the writ of certiorari is of itself and *proprio vigore* a supersedeas. Neither the inferior court nor the officer holding the process of such inferior court can rightfully proceed after formal notice of its having been issued. Every act done after such notice is not only irregular, but absolutely void; and the parties doing such acts are trespassers."

See, also, 2 Hawk. P. C., pages 400-416; 1 Bac. Abr. "Certiorari," G.; Comy. Dig. "Certiorari," G.

## III.

### Relief should be granted by the Court.

In view of the authorities cited in Points I and II of this brief, it is submitted that the petitioner ought not to undergo punishment while his case is pending on certiorari in this Court, and as the offense for which petitioner was convicted is a bailable offense, he should be admitted to bail.

In this connection the Court's attention is respectfully called to the fact that pending the determination of the cause in the United States Circuit Court of Appeals, the petitioner's bail was fixed in the sum of Fifteen Thousand ($15,000) Dollars (Rec., 205), and that the petitioner was out on bail until he was committed to the penitentiary on the mandate of the United States Circuit Court of Appeals.

## IV.

### The exceptional circumstances of the case.

Petitioner insists that he is innocent and that the record discloses a total failure of competent evidence to sustain the charge against him. This is one of the important specifications of errors assigned in the petition for certiorari where the evidence against the petitioner is set forth in detail.

The other important specification of error is that Judge Evans, who sat in the United States Circuit Court of Appeals on the hearing of the writ of error was disqualified to sit on the case.

While the general rule, when this Court reverses a decision of the United States Circuit Court of

Appeals wholly on a question of jurisdiction, is to remand the case to that court without passing upon its merits, this Court in the interest of justice has the power to, and in exceptional cases does determine the merits.

*Lamar* vs. *U. S.*, 241 U. S., 103.

And this Court may dispose of the entire case on the merits.

*Denver* vs. *New York Trust Co.*, 229 U. S., 123.

To remand the case for a new hearing to the United States Circuit Court of Appeals for the Seventh Circuit would afford no remedy to the petitioner, since it would most likely be heard before two of the same Judges who already heard the case. The petitioner was entitled to have his case heard in the first instance before three Judges, qualified under the law to sit in the case. The decision was reached unanimously by the three Judges. No reflection is intended against Judge Evans. No doubt the learned Judge in acting as he did, was influenced by the best of motives. But no one can tell to what extent Judge Evans' views prevailed and affected the judgment of his associates, who sat with him in this case. In these circumstances, it is hoped that this Court will on final hearing pass upon the whole case without remanding it for hearing to the United States Circuit Court of Appeals.

## CONCLUSION.

For the foregoing reasons it is respectfully submitted that the motion to admit petitioner to bail and to advance the cause for hearing ought to be granted.

Respectfully submitted,

LAURENCE M. FINE,
Attorney for Petitioner.

ELIJAH N. ZOLINE,
of Counsel

To the Honorable James M. Beck,
Solicitor General of the United States.

PLEASE TAKE NOTICE that the foregoing motion and brief in support of same will be submitted by me to the Supreme Court of the United States on the 12th day of November, 1923.

Dated, New York, October 30, 1923.

LAURENCE M. FINE,
Attorney for Petitioner.

ELIJAH N. ZOLINE,
of Counsel.

No. 354

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1923.

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THOMAS A. DELANEY,

Petitioner and Plaintiff-in-Error,

vs.

UNITED STATES OF AMERICA,

Respondent and Defendant-in-Error.

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## BRIEF FOR PLAINTIFF-IN-ERROR, DELANEY, ON RETURN OF WRIT OF CERTIORARI.

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LAURENCE M. FINE,
Attorney for Petitioner.

ELIJAH N. ZOLINE,
of Counsel.

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PRESS OF FREMONT PAYNE, INC., 80 Washington St., New York City.

## SUBJECT INDEX.

## Alphabetical Table of Cases.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1923.

THOMAS A. DELANEY,
Petitioner and
Plaintiff-in-Error,

against

UNITED STATES,
Respondent and
Defendant-in-Error.

## BRIEF IN BEHALF OF THOMAS A. DELANEY, PLAINTIFF-IN-ERROR.

### Statement.

This case is now before this Court on the return of the writ of *certiorari* to the United States Circuit Court of Appeals for the Seventh Circuit duly allowed by this Court, which Court affirmed a judgment of conviction imposed upon the plaintiff-in-error by the United States District Court for the Eastern District of Wisconsin on two indictments charging the plaintiff-in-error with others of con-

spiracy to violate the National Prohibition Act. These indictments are known in the record as Nos. 348-H and 350-H (Rec., 2-10).

Indictment No. 348-H charges the plaintiff-in-error Delaney jointly with Joseph Guidice, Joseph Dudenhoefer, Sr., Joseph Dudenhoefer, Jr. and Joseph Dudenhoefer Company, a corporation, with conspiracy to unlawfully purchase, transport, possess, barter, sell and deliver intoxicating liquors for beverage purposes in violation of the National Prohibition Act and to wrongfully make and cause to be made records, reports and affidavits in furtherance of such unlawful conspiracy.

Indictment No. 350-H is similar in tenor with indictment 348-H above described and covers the same period of time except that the name of Walter Burke is added as a co-defendant.

The overt acts alleged to have been committed by plaintiff-in-error Delaney, as recited in indictment 348-H are to the effect that he received from Joseph Guidice, co-defendant and co-conspirator at divers dates and times large sums of money in furtherance of the conspiracy.

Indictment No. 350-H sets forth similar overt acts and further charges that the plaintiff-in-error Delaney and Joseph Guidice had conversed and conferred with each other respecting unlawful transactions in intoxicating liquors.

The defendant, Joseph Guidice, died before the trial.

The defendant, Walter Burke, in indictment No. 350-H moved to quash said indictment, which motion was heard before the Honorable Evan A. Evans, a United States Circuit Judge holding a term of said District Court, and which motion was duly overruled by him (Rec., 244). See also affidavit of lawyer, ex-U. S. attorney, Rec. 247

The trial as to Walter Burke was severed. The two defendants, the Dudenhoefers, pleaded guilty.

The indictments 348-H and 350-H were by order of Court consolidated and plaintiff-in-error Delaney and the defendant, Joseph Ray, were placed on trial on March 6, 1922, before the Honorable Ferdinand A. Gieger, one of the Judges of the said District Court and a jury, resulting in a verdict of guilty on each of the aforesaid indictments. Motion for a new trial was overruled and thereafter on April 20, 1922, it was ordered that for the purpose of judgment and sentence, cases Nos. 348-H and 350-H were to be considered as one case and the plaintiff-in-error Delaney was sentenced to imprisonment in the penitentiary for the term of two years and to pay a fine of $10,000 (Rec., 32).

Plaintiff-in-error Delaney thereupon sued out a writ of error from the United States Circuit Court of Appeals of the Seventh Circuit to said District Court to review and set aside said judgment and sentence; whereupon proceedings upon the said writ of error came on for hearing on January 30, 1923, before said Circuit Court of Appeals, which said Court was composed of the Honorable Francis E. Baker, as Presiding Justice, and the Honorable Judges George T. Page and Evan A. Evans, as Associate Judges. (Rec. 216).

Thereafter on February 6, 1923, a judgment was rendered by the said United States Circuit Court of Appeals affirming the judgment and sentence of said District Court; whereupon plaintiff-in-error, in accordance with the rules of said United States Circuit Court of Appeals, filed his petition for rehearing in said United States Circuit Court of Appeals, which petition was on April 20, 1922, denied.

Whereupon plaintiff-in-error Delaney moved the said United States Circuit Court of Appeals to set aside and vacate its judgment and orders on the ground that one of the judges constituting said Court, i. e., the Honorable Evan A. Evans, was disqualified from sitting as such Associate Justice of said Court in the matter of the writ of error, as aforesaid, under Section 120 of the Federal Judicial Code (Rec., 235).

Upon the hearing of said motion, a certified copy of the record showing Judge Evans' participation in the hearing of motions and in entering judgments and orders in the Court below was produced and filed (Rec., 244); also a verified petition setting forth that Judge Evans partook in the deliberation upon the penalty to be inflicted upon the plaintiff-in-error Delaney. The verified petition and the record in the case show that the prosecution of the defendant Delaney, who was, prior to his conviction, the Federal Prohibition Director of the State of Wisconsin, is one of a series known as the "Wisconsin conspiracy cases" involving in all some twenty defendants and arising from inter-related facts, circumstances and overt acts in which it was charged that the plaintiff-in-error Delaney was involved and implicated. It appears that one Arthur Birk was placed upon trial before the said Honorable Evan A. Evans, holding a term of the District Court for the Eastern District of Wisconsin and a jury and that on April 12, 1922, a verdict was rendered finding the said Arthur Birk guilty as charged and that during the said trial the name of the plaintiff-in-error Delaney was repeatedly mentioned in a prejudicial manner (Rec., 235).

It further appears that on the 12th day of November, 1921, counsel for Walter M. Burke filed

a motion to quash indictment No. 350-H, which indictment was found against the plaintiff-in-error Delaney and said Walter M. Burke and others jointly, and being one of the indictments upon which the plaintiff-in-error Delaney was subsequently tried and convicted; that said motion came on for hearing on December 17, 1921, before said Judge Evans and was thereafter on December 22, 1921, duly denied by him (Rec., 244).

It further appears from said verified petition and record that thereafter and on or prior to the 20th day of April, 1922, and prior to the imposition of sentence upon the defendant Delaney, the said Judge Evans sat with other District Judges, to-wit, Judge Ferdinand A. Gieger and Judge Albert B. Anderson, each of whom had presided at the trials of the respective defendants named in the aforesaid indictments, and conferred and deliberated upon the penalties to be inflicted upon the plaintiff-in-error Delaney; that on the 20th day of April, 1922, said Judges proceeded to, and did, each severally pronounce sentence upon the several defendants who were tried before the said Judges respectively, including the plaintiff-in-error Delaney (Rec., 236).

Accordingly, it appears that said Judge Evan A. Evans, after having presided at the trial of Arthur Birk and after having heard, considered and denied a motion to quash indictment 350-H, upon which indictment, consolidated with indictment No. 348-H, the plaintiff-in-error Delaney was tried, and after having participated in the deliberations as to the penalty to be inflicted upon the plaintiff-in-error Delaney, is the same Judge who was one of the Judges composing the United States Circuit Court of Appeals for the Seventh Circuit sitting in

review upon the writ of error of the plaintiff-in-error Delaney.

On May 1, 1923, the said motion was duly argued before the said United States Circuit Court of Appeals and was then and there denied (Rec., 249); whereupon plaintiff-in-error Delaney duly presented his petition for certiorari in this Court, wherein after reciting the facts, he based his petition upon the following grounds:

> FIRST.—That he was denied his right to be confronted by the witnesses against him, as provided in Article 6 of the Amendment to the Constitution of the United States.
>
> SECOND.—The hearing of the writ of error in this cause was before a Court constituted in violation of Section 120 of the Federal Judicial Code providing; "that no Judge before whom a cause or *question* may have been tried or heard in a District Court, or existing Circuit Court, shall sit at a trial or hearing of such cause or question in the Circuit Court of Appeals."
>
> THIRD.—That there was such a complete failure of proof as to amount to a loss of jurisdiction of the trial Court.

All of the foregoing specifications of error are relied upon in this brief as grounds for the reversal of the judgments of the Courts below.

### Statement of the Evidence.

Thomas A. Delaney was appointed Prohibition Director of Wisconsin in November, 1919, when he was about 33 years of age. He was the first prohibi-

tion director of that district. He was a resident of Green Bay, Wisconsin, since he was nine years old. He was in charge of the Permission Branch of the department (Tr., 129). *There was also an Enforcement Branch over which Delaney had no jurisdiction* (Tr., 136). His post of duty was Green Bay (Tr., 137), where he spent half of his time, spending the balance of his time in Milwaukee, excepting when he was engaged in propaganda work (Tr., 132).

After taking office Delaney became acquainted with the Dudenhoefers, who were "among the largest sacramental wine dealers in the west." O'Neil, co-appointee, Chief Inspector of the Prohibition Department, prior to his appointment had been an employe of the Dudenhoefers for fifteen years (Tr., 75). Guidice and Burke were acquainted with Delaney through their activity in Democratic politics. Ray was a prohibition inspector. It is not denied that a conspiracy existed, but we most emphatically deny that there is any competent evidence in the record showing that the plaintiff-in-error Delaney was at any time a member of the conspiracy. It appears from the record that the illegal liquor deals were accomplished by the use of forms "number 1410." Legitimately, these forms, in triplicate, were given to a vendee who would make a verified application to purchase, then have the same approved by the Prohibition Department, leaving the original with that department, retaining one copy and giving the distillery the third copy (Tr., 130). *These approvals were made by clerks with a rubber-stamp signature of the director* (Tr., 130).

The Dudenhoefers testified they had paid almost $100,000 to *Guidice* for such "coverage permits"

(blank forms 1410 bearing rubber-stamp signature of Delaney) and that Guidice told them that he had obtained these permits *not from Delaney* but from Burke, and when, Burke's price was too high (Tr., 80)—from Ray. Dudenhoefer, Jr., testifies that he went to Chicago and bought two fictitious notarial seals for the purpose of verification on the false permits. There is no evidence in the record that Delaney took part in these transactions or had knowledge of same.

The government's case against Delaney is based upon evidence of what Guidice was supposed to have said to the Dudenhoefers in the absence of Delaney to the effect that certain money given to Guidice was for Delaney, and of Delaney's friendship with Burke, Guidice and the Dudenhoefers: Letters were introduced (Plaintiff's Exhibits 31, 32, 33, 34 and 14, Rec., 179) showing the intimate friendship between Delaney and Dudenhoefers. From these letters and other evidence it appears that Delaney made certain efforts in their behalf for the legitimate release of liquor for sacramental purposes; Delaney neither asked nor received compensation for it—the latter believing it to be his duty to facilitate the legitimate use of liquor. It also appears that the Dudenhoefers, despite the friendship and the frequent meetings, never by word, hint or gesture, suggested or intimated to Delaney anything regarding money or any unlawful transaction or permit, nor did they seek to learn if he received the money supposed to have been given him by Guidice.

From the testimony it does not appear that Delaney was a necessary party to the conspiracy; and it is submitted that this raises an inference that

the supposed friendship of these parties for Delaney was a design to divert Delaney's attention away from the illegal traffic.

No witnesses were produced who testified to anything of their own knowledge respecting any of the overt acts charged against Delaney. As already stated, Joseph Guidice, a co-conspirator, who it is charged in the "overt acts" had delivered money to the plaintiff-in-error, had died before the trial. The sole testimony touching the overt acts charged against the plaintiff-in-error Delaney was that of Joseph Dudenhoefer, Sr., and Joseph Dudenhoefer, Jr., confessed co-conspirators, and one Sherman G. Spurr.

The testimony of Joseph Dudenhoefer Sr., is solely as to what Guidice had made him believe and what Guidice had said and what his son, Joseph Dudenhoefer, Jr., had said Guidice had said. Joseph Dudenhoefer, Jr., also testified as to what Guidice had told him and what another co-conspirator, Walter Burke, had told witness that plaintiff-in-error Delaney had said. Government witness Spurr testified that he was in the investment bond business and that Guidice had bought from said witness Spurr liberty bonds of the face value of $17,000 and other bonds of the face value of $11,000. This the government attempted to show was with the money supposed to have been given to plaintiff-in-error Delaney by Guidice (Rec., ).

This witness Spurr, further testifies that (Tr., 106), "he (Guidice) rather gave me to understand he was buying them for somebody else," and as to what led the witness to such an inference, he testifies that what Guidice (since deceased) had said was (Tr., 105), "He passed it off in a peculiar way

—I do not know if there was any direct statement made." And further, what Guidice said was (Tr., 105), "not anything of any serious nature; *it was more of a kidding nature.*" That is to say, when Guidice told the witness, "in a kidding nature," that he was buying the bonds for "someone else," the inference is that he was buying them for the plaintiff-in-error. It is noteworthy that no testimony was offered touching other overt acts charged against this plaintiff-in-error. The sole testimony goes to the overt act charging the plaintiff-in-error with having received money from Guidice. Both Dudenhoefer, Sr., and Dudenhoefer, Jr., testify that Guidice had told them and had made them believe that he had delivered money to the plaintiff-in-error, and particularly Dudenhoefer, Jr., testifies as to the time and place such deliveries of money to plaintiff-in-error by Guidice were made. Yet government witness Spurr gives direct evidence that Guidice bought bonds with the money supposed to have been paid to plaintiff-in-error Delaney, which is further corroborated by Plaintiff's (Government's) Exhibits 36, 37, 38 and 39.

The plaintiff-in-error, Delaney, took the witness stand and denied that he received any money from Guidice; he denied *in toto* any participation in the conspiracy. It was shown that Guidice had large sums of money (Rec., 103-106) and it is submitted that the natural inference is that he kept all moneys received from the Dudenhoefers and gave none to Delaney.

It is contended that the record reveals a total failure or proof of the existence of a conspiracy involving the plaintiff-in-error, Delaney. The government offered no other testimony relating to a con-

spiracy other than the hearsay evidence of Dudenhoefer, Sr., and Dudenhoefer, Jr., that they had been told or made to believe by Guidice, months prior to his decease, that the said Guidice had made deliveries of money to the defendant Delaney. This testimony was followed by direct evidence of government witness Spurr that Guidice, contrary to his statements to the Dudenhoefers, had bought bonds with a large portion of the money he had professed to have delivered to defendant Delaney; but that, "in a kidding nature" Guidice had intimated he was buying the bonds for "someone else." It is the contention of the government that the "someone else" was the defendant Delaney.

## Brief of the Argument.

### I.

From the foregoing statement of the facts, it clearly appears that the plaintiff-in-error Delaney was convicted upon statements made by a dead man, Guidice, in the absence of the plaintiff-in-error Delaney and upon the rankest kind of hearsay testimony.

The record in this cause discloses a flagrant violation of a citizen's right to be confronted with the witnesses against him. Delaney was accused and convicted upon the most palpable hearsay. The right of confrontation is recognized in every state constitution as well as the Federal constitution. It is not a mere idle form which is secured by the organic law of the land, but a real right, which courts are powerless to withhold. The first ten amendments, collectively regarded as a bill of

rights, were adopted because the people of the nation demanded security of the highest order for these rights. Not the least of the rights secured is the right to be confronted with the witnesses accusing. The rights thereby secured are the rights which our ancestors had, through suffering, finally come to enjoy, and which they did not propose should rest upon an insecure foundation. They were declared, then, to be constitutional rights, and, as such they should be jealously guarded and protected by the courts.

The right of confrontation demands that the accused shall have the opportunity to cross examine his accuser. This is the essence of the right. Deprived of the right to cross examine the accusing witness, an accused person is, in effect, condemned upon an *ex parte* proceeding.

It is well known that frequently a decisive moral effect results from the mere appearance of a witness in open court, and a defendant is entitled to the full benefit of such moral effect as may appear upon a cross examination of the witness.

An eminent former justice of this court spoke of the Sixth Amendment as conferring "among the most important rights which are guaranteed by the constitution to a person charged with offences against the United States." He then speaks of the right to be confronted with the witnesses against him and says this means that "no evidence shall be brought against him on his trial made up of depositions, or affidavits, or *hearsay statements*, but that the witnesses by whom his guilt is to be established shall be brought face to face with him in order that he may see them and hear them, witness their manner of testifying, and so that either by

himself or his counsel they may be subjected to such cross examination as he may consider of benefit to his interests."

Mr. Justice Miller on the Constitution (pages 508 and 509).

The case of *Kirby* vs. *United States*, 174 U. S., 47, involved the question as to an accused's right to be confronted with the witnesses. A Federal statute purported to make a judgment of conviction against the principal felons evidence against a person charged with receiving stolen property.

The defendant was convicted and appealed, complaining that he had been denied his right to be confronted with the witnesses against him. This court reversed the conviction and said:

> "One of the fundamental guarantees of life and liberty is found in the Sixth Amendment of the Constitution of the United States, which provides that in all criminal prosecutions the accused shall be confronted with the witnesses against him. Instead of confronting Kirby with witnesses to establish the vital fact that the property alleged to have been received by him had been stolen from the United States, he was confronted only with the record of another criminal prosecution, with which he had no connection and the evidence in which was not given in his presence. The record showing the results of the trial of the principal felons was undoubtedly evidence, as against them, in respect of every fact essential to show their guilt. But a fact which can be primarily established only by witnesses cannot be proved

against an accused—charged with a different offence, for which he may be convicted without reference to the principal offender—except by witnesses who comfort him at the trial, upon whom he can look while being tried, whom he is entitled to cross examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases. The presumption of the innocence of an accused attends him throughout the trial and has relation to every fact that must be established in order to prove his guilt beyond reasonable doubt. * * * But that presumption in Kirby's case, was in effect held in the court below to be of no consequence; for, as to a vital fact which the government was bound to establish affirmatively, he was put upon the defensive almost from the outset of the trial by reason alone of what appeared to have been said in another criminal prosecution with which he was not connected and at which he was not entitled to be represented" (pages 55, 56).

In *Dowdell* vs. *U. S.*, 221 U. S., 325, the substance of the Sixth Amendment (as amended in the Philippine Bill of Rights) was considered. The court said:

"This provision of the statute intends to secure the accused in the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an op-

portunity of cross examination. It was intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits, and particularly to preserve the right of the accused to test the recollection of the witness in the exercise of the right of cross examination" (page 330).

See also:

*Mattox* vs. *U. S.*, 156 U. S., 237;
*Kirby* vs. *U. S.*, 174 U. S., 47;
Wigmore, V. 2, 1396-1397.

In *Motes* vs. *U. S.*, 178 U. S., 458, the defendants were charged with a conspiracy to injure a citizen in the exercise of his rights. Taylor, a defendant, at preliminary hearing testified and his evidence was reduced to writing and signed by him. At the trial Taylor disappeared, just before the case was called. The written evidence of Taylor was sufficient, if accepted, to establish guilt of all defendants. The other defendants had a chance to cross examine at the preliminary hearing (see pages 470, 471). The court notes that, at time of Taylor's statement, there had been no proof of a conspiracy (page 471). The court held the admission of Taylor's statement to be a violation of the accused's rights to be confronted with the witnesses, citing Cooley Const. Lim., Sec. 218. In the instant case Guidice never was cross examined by the plaintiff-in-error, Delaney, or anyone else for the reason that he died several months before the trial.

II.

**The finding of guilty, not based upon any legal evidence, is manifest error, calling for reversal.**

*In re Watts*, 190 U. S., 1 (page 35);
*Hyde* vs. *Shine*, 199 U. S., 85;
*Tinsley* vs. *Treat*, 205 U. S., 20;
*Chin Yow* vs. *U. S.*, 208 U. S., 8;
*Kwock Jan Fat* vs. *White*, 253 U. S., 454;
*Ex Parte Craig*, 282 Federal, 138 (page 154).

**(a) The admission of hearsay evidence was highly prejudicial to plaintiff-in-error, Delaney.**

*Logan* vs. *United States*, 144 U. S., 263;
*Brown* vs. *United States*, 150 U. S., 98;
*Sorenson* vs. *United States*, 143 Federal, 821;
*Leady* vs. *United States*, 280 Federal, 864;
*Heard* vs. *United States*, 225 Federal, 829;
*Harrington* vs. *United States*, 267 Federal, 97;
*Heaton* vs. *United States*, 280 Federal, 697.

**(b) This court will reverse, in a case of this character, although formal objection to harmful evidence may be considered as not properly made.**

*Crawford* vs. *United States*, 212 U. S., 183;
*Clyatt* vs. *United States*, 197 U. S., 207;
*Wiborg* vs. *United States*, 163 U. S., 633;
*Weems* vs. *United States*, 217 U. S., 349.

**(c) A state of proof consistent with innocence demands a reversal.**

The record may be searched in vain for any direct evidence tending to implicate Delaney in guilt. Rumor and idle gossip have wrought the ruin of an innocent man and only the action of this court can, in a measure, restore to him the priceless boon of freedom. There is a total failure of proof to show guilt. The result would be grotesque if it were not so tragic to a man who has been made the victim of misguided official zeal upon the part of the Federal officials.

In *Leady* vs. *U. S.*, 280 Fed., 864 (8th Cir. Ct.) the court admitted in evidence statements made by alleged co-conspirators, after commission of offense. The defendant was convicted and its judgment was reversed. It was said:

> "It is quite obvious that Leady would not and could not have been convicted if this incompetent and highly prejudicial testimony, which was mere hearsay, had been excluded."

See, also,

*Heard* vs. *U. S.*, 225 Federal, 829;
*Harrington* vs. *U. S.*, 267 Fed., 97.

*Heaton* vs. *U. S.*, 280 Fed., 697, where evidence that alleged bribe giver had withdrawn $1,000 from bank (in absence of defendants) was admitted by the trial court and was held to be error for which judgment was reversed.

The record in this cause presents a very exceptional case. The total failure of proof to show the

guilt of Delaney, followed by his conviction, suggests a very singular situation and strongly emphasizes the necessity of guarding against the impairing of the most sacred rights of man through careless attention as to the manner or method of procedure. It may be that it will be stated that objection to the harmful evidence, or rather, the idle and vicious hearsay which was admitted, was not specific enough. This court will, however, reverse in cases of exceptional hardship, particularly where there is no adequate proof of guilt.

In *Wiborg* vs. *United States,* 163 U. S., 633, the court held that there was no adequate proof of guilt, and, although no motion was made to instruct in favor of the defendant, the judgment of conviction was reversed.

It was a grave error to admit evidence as to what alleged co-conspirators had said regarding the part Delaney is alleged to have taken. This was no part of the *res gestae.* It was purely narrative; and it must be very obvious to any inquiring mind that if such harmful and illegal matter were eliminated from the record, there would remain no evidence whatever, which could create the remotest suspicion of guilt.

An instructive case is *Clyatt* vs. *United States,* 197 U. S., 207. There the accused was convicted of a violation of the statute against peonage. No motion was made to instruct the jury to find the defendant not guilty, and yet this court felt justified "in examining the question in case a plain error has been committed in a matter so vital to the defendant" (page 222).

In *Sullivan* vs. *United States,* 283 Federal, 865, the verdict and judgment of conviction were held

to have no basis except suspicion. The defendant had been convicted of a violation of the Anti-Narcotic Act. The Circuit Court of Appeals (Eighth Circuit) reversed defendant's conviction. It was said:

> "All the evidence, if any there was against him was circumstantial. * * * When the record in this case is carefully read and deliberately considered, it leaves no doubt that the only real basis for the verdict and judgment, the indictment and prosecution in this case, was suspicion. * * * Fortunately, the law sternly forbids the conviction of the accused upon suspicion."

The case at bar discloses a gross violation of the constitutional right of the defendant to be confronted with the witnesses against him. If there had been a statutory provision to substitute hearsay evidence, such evidence would have been improper and inadmissible under the authority of *Kirby* vs. *United States*, above referred to. Congress itself cannot sanction the violation of the Sixth Amendment by allowing the substitution of hearsay evidence in place of the sworn evidence of witnesses offered in open court, in the presence of the accused. It is manifest that Congress has no such power and it therefore must be obvious that the ruling of the trial court in admitting such evidence, and the Court of Appeals in approving of such evidence, constitute reversible error.

III.

Judge Evans could not legally sit in the Court of Appeals and its judgment, as a result, is void.

Section 120 of the Federal Judicial Code.

*Regina* vs. *The Justices*, 6 Queens Bench, 753.

*Queen* vs. *Justices*, 18 Q. B., 416.

*Oakley* vs. *Aspinwall*, 3 N. Y., 547.

*American Construction Co.* vs. *Jacksonville*, 148 U. S., 372.

*Cramp* vs. *International Co.*, 228 U. S., 645.

*Rexford* vs. *Brunswick*, 228 U. S., 339.

*Moran* vs. *Dillingham*, 174 U. S., 153.

*People* vs. *Connor*, 142 N. Y., 130.

*Van Arsdale* vs. *King*, 152 N. Y., 69.

The verified petition of Delaney (Rec., 236) presented to the Court of Appeals (and incorporated in the transcript of the record), set forth facts, not disputed, from which it appeared that Mr. Justice Evans sat in the trial court in the consideration of matters closely related to the facts involved in the charges against Delaney. In fact, Judge Evans took part in the deliberations which resulted in the fixing of the penalties awarded the convicted persons, including Delaney. He thus became disqualified to sit in a court of review; and his disqualification became absolute, because of the prohibition of a Federal Statute, and could not depend upon any circumstances from which a waiver could be implied.

Judge Evans also heard, considered and adjudicated a motion to quash Indictment 350-H (Rec., 244). Had Judge Evans granted the motion to

quash, it would have had the effect of adjudicating the cause as to all defendants named in the indictment. The denial of said motion, likewise, was an adjudication.

Plaintiff-in-error was condemned by a court constituted in direct violation of a statute, mandatory in character.

Section 120 of the Federal Judicial Code provides:

> "That a Judge before whom a cause or *question* may have been tried or heard in a District Court, or existing Circuit Court, shall sit at the trial or hearing of such cause or *question* in the Circuit Court of Appeals."

In *Cramp* vs. *International Curtiss Co.*, 228 U. S., 645, Section 120 of the Judicial Code which prohibits a judge sitting in trial court, from sitting on hearing in Court of Appeals, was considered and it was held reversible error, although the trial judge merely entered a *pro forma* decree, without consideration of the matter.

*Rexford* vs. *Brunswick*, 228 U. S., 339, is to the same effect. Here the attorney for a party stated there was no objection to the trial judge sitting.

See also:

*Am. Const. Co.* vs. *Jacksonville*, 174 U. S., 153;
*Slater* vs. *Willegs*, 16 App. D. C., 369;
*Moran* vs. *Dillingham*, 174 U. S., 153.

In *Am. Const. Co.* vs. *Jacksonville*, 148 U. S., 372, the trial judge sat in review. The Supreme Court said:

"The more important suggestion is that the decree of the Circuit Court of Appeals is void, because Judge Pardee took part in the hearing and decision in that court, though disqualified from so doing by Section 3 of the Judiciary Act of 1891, which provides that 'no justice or judge, before whom a cause *or question* may have been tried or heard in the Circuit Court, shall sit on the trial or hearing of such cause or question in the Circuit Court of Appeals.'

"The question whether this provision prohibited Judge Pardee from sitting in an appeal which was not from his own order, but from an order setting aside his order, is a novel and important one, deeply affecting the administration of justice in the Circuit Court of Appeals. If the statute made him incompetent to sit at the hearing, the decree in which he took part was unlawful, and perhaps absolutely void, and should certainly be set aside or quashed by any court having authority to review it by appeal, error or by certiorari."

The language of this court in *McClaughry* vs. *Deming*, 186 U. S., 49, in discharging upon *habeas corpus* one convicted by a court-martial, is very significant. It was held that the court-martial was constituted in violation of law, and therefore, had not the power to convict. It was said:

> *"It was therefore in law no court.* The men were disqualified to act as members thereof, and no challenge was necessary, for there was no court to hear and dispose of the challenge. It is unlike an officer who might be the subject of challenge as under some bias. A failure to

challenge in such a case might very well be held to waive the defect, and the officer could sit and the finding of the court be legal."

"But this not the case of a personal challenge of some member of the court where an objection to his sitting might be thus particularly raised. It is an objection that the whole court as a court was illegally constituted because in violation of the express provision of the statute, and the challenge to the whole court is not provided for by the statute. But it is said defendant did not object to being tried by this illegally constituted court, and that his consent waived the question of invalidity. We are not of that opinion. It was not a mere consent to waive some statutory provision in his favor which, if waived, permitted the court to proceed. This consent could no more give jurisdiction of the court either over the subject-matter or over his person, than if it had been composed of a like number of civilians or of women. The fundamental difficulty lies in the fact that the court was constituted in direct violation of the statute, and no consent could confer jurisdiction over the person of the defendant or over the subject-matter of the accusation, because to take such jurisdiction would constitute a plain violation of law. This consent had no effect whatever in the face of the statute, which prevented such men sitting on the court. The law said such a court shall not be constituted, and the defendant cannot say it may, and consent to be tried by it, any more than he could consent to be tried by the first half a dozen private soldiers he should

> meet; and the decision of neither tribunal would be validated by the consent of the person submitting to such trial" (pages 65, 66). (Italics ours.)

This court then refers to the opinion in the leading case of *Oakley* vs. *Aspinwall*, 3 New York, 547, approved the principle there announced, and said:

> "A judge who is prohibited from sitting by the plain directions of the law, cannot sit, and the consent that he shall sit gives no jurisdiction. This is the doctrine of the above case. It has been followed without doubt or hesitation in the State of New York ever since its rendition in 1850" (page 68).

The sitting by Judge Evans in the Court of Appeals, after having participated in some of the proceedings in the court below, was a mistake. "Such mistakes are not uncommon," said the New York Court of Appeals (*Van Arsdale* vs. *King*, 152 N. Y., 69). "But litigants, particularly persons charged with crime, *have a right to have their case determined by a court constituted according to law.*"

The Court of Appeals has only the jurisdiction conferred by statute. Its jurisdiction was, therefore, strictly limited and placed squarely under the prohibition that no judge having heard a cause in the trial court, or "a question" arising therein, could sit in the court of review. The power of decision, in other words, was withheld from him, and effectually denied him. The Court of Appeals had no authority to render any judgment.

The plaintiff-in-error was protected by an express, mandatory provision of the statute, which denied judicial power to Judge Evans, while sitting in the Court of Appeals. Within the meaning of the opinion in *ex parte Nielsen*, 131 U. S., 176, "he was protected by a constitutional provision, securing to him a constitutional right. It was not a case of mere error in law, not a case of denying to a person a constitutional right; and where such a case appears on the record, the party is entitled to be discharged from imprisonment. * * *

IV.

**The exceptional circumstances of the case require that this Court should decide every question in the case on the merits.**

The plaintiff-in-error insists that he is innocent and that the record discloses a total failure of competent evidence to sustain the charge against him. This is one of the important specifications of errors assigned in the petition for certiorari.

The other important specification of error is that Judge Evans, who sat in the United States Circuit Court of Appeals on the hearing of the writ of error was disqualified to sit on the case.

While the general rule, when this Court reverses a decision of the United States Circuit Court of Appeals wholly on a question of jurisdiction, is to remand the case to that court without passing upon its merits, this Court in the interest of justice has the power to, and in exceptional cases does determine the merits.

*Lamar* vs. *U. S.*, 241 U. S., 103.

And this Court may dispose of the entire case on the merits.

*Denver* vs. *New York Trust Co.*, 229 U. S., 123.

To remand the case for a new hearing to the United States Circuit Court of Appeals for the Seventh Circuit would afford no remedy to Delaney, since it would most likely be heard before two of the same Judges who already heard the case. Delaney was entitled to have his case heard in the first instance before three Judges, qualified under the law to sit in the case. The decision was reached unanimously by the three Judges. No reflection is intended against Judge Evans. No doubt the learned Judge in citing as he did, was influenced by the best of motives. But no one can tell to what extent Judge Evans' views prevailed and affected the judgment of his associates, who sat with him in this case. In these circumstances, it is hoped that this Court will on final hearing pass upon the whole case without remanding it for hearing to the United States Circuit Court of Appeals.

## CONCLUSION.

With all proper deference to the governmental agencies concerned in the prosecution in this case, we insist that the result attained in the conviction of Delaney is a grave judicial mistake, such as is probably unparalleled in the history of American jurisprudence. Human fallibility seems never so disastrous as in the enforcement of criminal justice which results in the abasement of an innocent young man raised in affection for his country, con-

fidence in its laws and pride in its courts. An enormous hardship and injustice has been inflicted upon Delaney wholly unwarranted by any legal evidence. We submit that, upon the record, this court should declare his conviction unsupported by the evidence, and that the judgments of the trial court and of the U. S. Circuit Court of Appeals should be reversed.

Respectfully submitted,

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